Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DAVID L. HIGGS and
RODNEY W. YOUNG,
Petitioners

v.

PLYMOUTH COUNTY SUPERIOR COURT,
RICHARD J. CHIN, individual & official capacities,
LINDA E. GILES, individual & official capacities,
CLERK(s) JOHN DOE at the Superior Court,
EX PARTE JOHN DOE(s);

MASSACHUSETTS APPEALS COURT,
R. MARC KANTROWITZ, official capacity,
GILBERT P. LIMA, individual & official capacities;

SUPREME JUDICIAL COURT OF MASSACHUSETTS,
MARGARET H. MARSHALL, official capacity;

THOMAS F. REILLY, official capacity, and
KURT N. SCHWARTZ, ind. & official capacities,
Respondents.

On Petition for a Writ of Certiorari to The First Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a state court order in which key evidence has been diametrically misrepresented in denying an evidentiary hearing – specifically a dismissive decision and order of summary judgment showing extrinsic fraud on its face – can be declared void by a United States District Court or Circuit Court of Appeals.

While the petitioner-plaintiffs recognize that the *Rooker-Feldman* doctrine formulated by this Court shields state courts from unconstitutional 'second guessing' by the lower federal courts, at least seven circuit courts are in general agreement that a state decision compromised by extrinsic fraud can be declared retroactively void by a federal district court or circuit court of appeals.

The petitioners, who filed a 42 U.S.C. § 1983 complaint in United States District Court for the District of Massachusetts, contend that the First Circuit Court of Appeals in affirming the district court's summary dismissal of their case is out of step with the best application of *Rooker-Feldman*.

Giving priority to absolute immunity of state judges and public officials, the federal courts discounted the predictable effect of serial distortions of the record on a summary judgment of a ten-count civil suit.

The federal courts accepted defense arguments similar to those rejected by the Ninth Circuit in the precedential case Kougasian v. TMSL, Inc., infra, which parallels plaintiffs' civil-rights action, and defines an exception to the application of *Rooker-Feldman* in line with earlier case law.

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OPINIONS BELOW

The judgment of dismissal of Higgs v. Plymouth County Superior Court[1] by the First Circuit Court of Appeals affirming the District Court's memorandum and order: infra Appendix A.

The memorandum and order of the United States District Court for the District of Massachusetts allowing defendants' motion to dismiss Beck v. Plymouth County Superior Court: infra Appendix B.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on April 4, 2008. The jurisdiction of this Court is invoked under 42 U.S.C. § 1983.

STATEMENT

Proceedings Below

In February 1997, the late Roberta Beck (herein "Beck"), a dedicated volunteer, employee, and parent at South Shore Charter School, along with Petitioner Rodney W. Young (hereinafter "Young"), a volunteer and school consultant, jointly informed the school's Board of Trustees that in the first two quarters of fiscal year 1997 the school's CEO had cheated the Massachusetts and federal governments of thousands of dollars by submitting unwarranted "tuition claims" to the state for reimbursement.

Receiving a perfunctory denial of wrongdoing from the trustees, the plaintiffs reported the school's unabated fiscal illegalities to the Associate Commissioner of Education (charter schools). They were immediately rebuffed by that official, who accused them of being "agents of the National Education Association" bent on destroying the charter-school movement.

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[1] Formerly "Beck v. Plymouth County Superior Court."

In November 1997, Beck and Young, joined by Petitioner David L. Higgs (hereinafter "Higgs"), like Beck a parent and school volunteer, conveyed their concerns to the Plymouth County District Attorney, and subsequently on his recommendation lodged a formal complaint with the Office of the State Auditor [OSA]. OSA launched a 15-month audit of South Shore Charter School that in May 1999 reported $1.1 million in "undocumented billings" submitted to the state in the school's first 13 months.

In his agency's "Report on Certain Activities of the South Shore Charter School" (#98-4063-3), the State Auditor included his strong recommendation that the state DOE immediately investigate the questioned tuition claims, which in number and dollar amount were glaringly disproportionate to the school's modest 250-student enrollment and $2-million annual budget.

The Commissioner of Education rejected the Auditor's recommendation out of hand, characterizing the enrollment irregularities found by OSA as but "clerical errors." The Commissioner was aware that during the 15-month OSA audit, officials at the school and Department of Education had been publicly attributing all "errors" in tuition claims to the very whistle-blowers, Beck and Young.

Following publication of the OSA audit in May 1999, school and DOE officials leveled still more accusations specifically against petitioners Young and Higgs, including serious charges of child endangerment and computer hacking.

In January 2000 Beck, Higgs, and Young filed a defamation action (herein *"Beck I"*) in Massachusetts Plymouth County Superior Court against the South Shore Charter School, its CEO, Headmaster, and Trustees Chairman; the Mass. Department of Education, the Commissioner of Education, and two Asso-

ciate Commissioners (charter schools). Subsequently the case was dismissed in a Decision and Order of Summary Judgment signed February 25, 2002.

Distribution of the state judgment in early March 2002, following three months advisement, apparently occurred unexpectedly. A senior sessions clerk of the Plymouth County Superior Court responding sympathetically to a desperate plea phoned by Plaintiff Roberta Beck from her death bed, located the process late on a Friday afternoon. Noting that the order had long been signed, the clerk made immediate distribution. The following week a female identifying herself as a member of the court's staff instructed plaintiffs by phone to return all envelopes unopened – a request the plaintiffs refused.

Immediately apparent in the Decision and Order were citations to the record that grievously misrepresented thirteen key plaintiff exhibits, each material to one or more of the ten counts. In their appeal to the Massachusetts Appeals Court the plaintiffs suggested that the lower court process had been adulterated by John Doe clerk(s) at the bidding of unknown *ex parte* person(s), in order to assure dismissal.

Presumably the most flagrant misquotes and misinterpretations – obvious to any litigant on first reading – were to have been eliminated after the order was signed and before distribution was made.

Without specifically addressing the misrepresentations enumerated by the appellants, the Massachusetts Appeals Court affirmed the decision. Subsequently the Mass. Supreme Judicial Court denied "further appellate review."

In September 2006 the petitioner-plaintiffs filed a civil-rights action with the United States District Court for the District of Massachusetts naming all

court and government officials involved as defendants.

Citing extrinsic fraud, the petitioner-plaintiffs sought a declaratory judgment that would void the summary dismissal of the state superior court and mandate an evidentiary hearing in *Beck I*. Subsequently, the district court allowed a defense motion to dismiss, on grounds that the decisions of state judges and government officials generally are not subject to federal review, and that, in the court's opinion, plaintiffs' assertion of extrinsic fraud lacked *particularity*.

The district court opined that the petitioner-plaintiffs' "... complaint alleges in essence, that judges, clerks and prosecutors at every level of the state judicial system conspired to deprive the plaintiffs of their civil rights by ruling against them at every turn." (App. B, p. 3)

The petitioner-plaintiffs emphasized in their action that they did not hold the named defendants in *Beck II* for error, malice, or liable for damages; they attributed all deliberate wrongdoing to ex parte John Doe(s).

In their appeal to the First Circuit the petitioner-plaintiffs illustrated their overall charge of extrinsic fraud in two citations to the record that are material in four of the ten counts in *Beck I*: (1) to a so-called "Pollets Report" prepared by school trustees concluding an investigation called by the plaintiffs under Massachusetts General Law and Regulations (p. 11); and (2) to a so-called "Case Closures" report of the FBI concluding an investigation called by several *Beck I* defendants against a plaintiff (p. 13).

Petitioners selected the school and FBI investigative reports to show in the summary judgment the typical misstatements and misquotes of material exhibits that defendants concede but say are insignificant. The petitioners say that such misrepresentations corrupted the court process, count by count. ~

REASONS FOR GRANTING THE PETITION

Legal Standard

References herein to "Beck et al. v. DOE et al." filed in Mass. Superior Court in January 2000, and to "Beck et al. v. Plymouth Superior Court et al.," filed in the United States District Court in September 2006, are abbreviated "*Beck I*" and "*Beck II*," respectively. In deciding petitioners' appeal of *Beck II*, the First Circuit Court of Appeals adopted without qualification the opinion of the district court (App., infra, A, B).

While plaintiffs in *Beck I* and *Beck II* are the same, defendants in the two actions are exclusive, as are the remedies sought. *Beck I* is a defamation suit for damages. *Beck II* is a civil rights complaint brought under 42 U.S.C. § 1983 seeking a declaratory judgment but no damages. Although the two cases are related as to plaintiffs and exhibits, the petitioners say that the causes are not "intertwined," as would otherwise deny subject-matter jurisdiction to the district court. See District of Columbia Court of Appeals v. Feldman, 460 U.S. at 483 n. 16 (1983).

For instance, while the aforementioned FBI report was obtained to support plaintiffs' state charges of defamation, an argument before a federal court that the report was deliberately misquoted to reverse its meaning can hardly be *intertwined*. The integrity of the court – indeed of the judicial process – surely overarches claims and counterclaims under adjudication.

In *Beck II* the petitioner-plaintiffs based their appeal generally upon the established legal standard that under Fed. R. Civ. P. 12(b)(6) a complaint cannot be dismissed for failure to state a claim "... unless it appears, beyond doubt, that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Judge v. City of Lowell, 160

F.3d 67, 72 (1st Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The petitioners take issue with the district court's assessment as "opaque" their arguments that the state court's rulings, count by count, were compromised by false citations to the record (App. B, p. 9). The aforementioned "Pollets" and FBI reports, placed in the record by the plaintiffs to prove libel and slander, were visibly misquoted and metaphrased to disprove the very defamation alleged (pp. 11-15).

Moreover, with all respect due the district court, the plaintiffs doubt that the court seriously weighed their arguments. Recurrent references in the court's order to the six named defendants, who are officials either of a regional charter school or the state department of education, as, inexplicably, "Town officials" or "Town of Plymouth school officials" [2] (App. B, pp. 2, 3, 8) are disturbing and beyond 'opaque.'

The quizzical anomaly suggests cursory case review and *ex parte* misinformation. Minimally it shows failure to consider, let alone to "... accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." Langadinos v. American Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000).

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[2] In dismissing the plaintiffs' arguments as "opaque," the district court *repeatedly* mistakes defendants in *Beck I* as "Town officials" or "Town of Plymouth school officials." (App. B, pp. 2, 3, 8)

Throughout the complaint there are nearly 100 unambiguous references to the defendants as officials either of the regional South Shore Charter School drawing its student body from 26 cities and towns in metropolitan Boston, or of the Massachusetts Department of Education located in Malden, Mass. None of the defendants, including the state Commissioner of Education, are ever associated with a municipal school system. There is not one reference to the Town of Plymouth in *Beck I* or *Beck II*.

JUDICIAL IMMUNITY NOT VIOLATED

The district court asserts, "Absolute immunity from civil liability applies to any judicial officer for any normal and routine judicial act. Stump v. Starkman, 435 U.S. 349 (1978). Judges of courts of general jurisdiction are, therefore, not liable in a civil action for damages arising from their judicial actions. Id." (App. B, p. 5)

In their complaint – and in accord with *Stump* – the plaintiffs requested a declaratory judgment, but did not additionally suggest monetary or other compensatory relief, understanding that under *Rooker-Feldman* jurists cannot be held liable for damages. There appears, however, no precedent to preclude that judges and quasi-judicial officers be held answerable in a federal court for purely adjudicative consequences of decisions within their jurisdiction.

The district court appears to accept *without qualification* defendants' claim in their motion to dismiss, that "... immunity ... of judges of courts of general jurisdiction ... covers acts no matter how allegedly malicious, corrupt, in excess of authority, or flawed by grave procedural error."

However, "[a]t least seven Circuits have indicated affirmatively that there is no immunity bar to [injunctive] relief, and in situations where in their judgment an injunction against a judicial officer was necessary to prevent irreparable injury to a petitioner's constitutional rights, courts have granted that relief." [fn16] Pulliam v. Allen, 466 U.S. 522, 536-537 (1984).

Substantively parallel to *Beck II*, *Pulliam* "... raises issues concerning the scope of judicial immunity from a civil suit that seeks *injunctive and declaratory*

relief under Section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983" (id) (italics supplied).

In *Beck II* the plaintiffs pray for declaratory relief "in the nature of mandamus." And, while a writ of mandamus "... should be 'reserved for really extraordinary causes,' *Ex parte Fahey*, 332 U.S. 258, 260 (1947), ... there has been no suggestion that judicial immunity prevents the supervising court from issuing the writ." *Pellium* 538.

The petitioners say that abject fraud – and for the instant purpose, abject *extrinsic* fraud – is irrefutable in all thirteen misrepresentations of the record they allege in *Beck I*, including citations by the court to two official investigative reports illustrated herein (see "False Declarations," pp. 11-15).

Serial citations to the record in a court process that metaphrase, or by substitution, insertion, or unacknowledged omission of words and phrases, meticulously misquote key evidence, reversing its import and materiality in favor of one party, cannot have been inadvertent. Such manipulations surely provide the "extraordinary cause" stipulated in *Ex parte Fahey*.

Quasi - Judicial Immunity not Violated

The district court dismissed plaintiffs' "... **allegation against the prosecutors** ... [who] **declined to initiate an investigation** ..," ruling, "**That decision is within the discretion of the prosecutors** ...." However, the Court also observed that "**[t]he principles of judicial immunity ... extend to prosecutors**" (Imbler v. Pachtman, 424 U.S. 409, 420 (1976)). (App. B, pp. 5, 6) So too then must extend the exception to judicial immunity of "extraordinary cause" as developed in *Pulliam*.

ROOKER-FELDMAN ABSTENTION

Judicial Error not Charged

The district court observes, "**This case falls within the Rooker-Feldman doctrine because the plaintiffs seek relief from a state court judgment for alleged legal error committed by the state court.**" (App. B, p. 6)

The district court further asserts that the plaintiffs had proceeded against "... **courts, judges and prosecutors ... for their failure to rule in the plaintiffs' favor or to prosecute the plaintiffs' criminal complaint.**" (App. B, p. 3)

On the contrary, the petitioner-plaintiffs took pains in their federal submission not to accuse any state justice or prosecutor of legal error. Their complaint focused exclusively upon *extrinsic fraud,* which they say misinformed a decision and order of summary judgment, denying them due process.

In their opposition to defendants' motion for dismissal, the plaintiffs reiterated that they "... categorically do not ask [the US District] Court to evaluate the [Massachusetts] Superior or Appeals Courts' decisions for legal error, but rather to declare both void because of visible, material misrepresentations of key exhibits corrupting the legal process in Beck I."

Extrinsic fraud

Mindful of *Rooker-Feldman*, the plaintiffs alleged that *extrinsic fraud* – not judicial error – compromised the Decision and Order of Summary Judgment of the Plymouth County Superior Court in Beck I.

Petitioners have been aware from the outset that to allege judicial error by a state court would be to define the *Rooker-Feldman* bar to federal jurisdiction. Moreover, they do not believe that judicial error was in the least involved.

"If a federal plaintiff asserts *as a legal wrong* an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction." Noel v. Hall, 341 F.3d 1148, 1164 (9th Cir. 2003). (italics supplied)

In *Kougasian v. TMSL, Inc., 359* F.3d 2535, 2544 (9th Cir. 2004), the Ninth Circuit Court of Appeals observed that while Plaintiff "... Kougasian seeks relief from the judgments of the state courts ... she does not allege that she has been harmed by legal errors made by the state courts. Rather, she alleges that the defendants' wrongful conduct has caused her harm."

Kougasian complained that a state court was misinformed by a false declaration filed by an adverse party. The petitioner-plaintiffs in *Beck II* complain similarly that adverse party(ies) misinformed a state process by incorporating false declarations therein. In both *Kougasian* and *Beck II* the fraud claimed is self-evident and clearly extrinsic.

However, opposite the adjudication of *Beck II*, the circuit court in *'Kougasian III'* rigorously distinguished adjudicative misinformation from judicial misjudgment, and found for the plaintiff.

FALSE DECLARATIONS

The district court observes, "**While in the view of the plaintiffs the signs of third-party intrusion in the judicial process are 'crystal clear', those signs are opaque to this Court.**" (App. B, p. 9, 10)

The plaintiffs are bewildered that the district court found abstruse five direct comparisons drawn by plaintiffs showing diametric misrepresentations of the case record in *Beck I* – not ascribable to transcription error. Then again plaintiffs were jarred by the district court's confounding of six defendant regional and state education officials, including the Commissioner of Education, with "Town officials" and "Town of Plymouth school officials." (p. 6; App. B, pp. 2, 3, 8)

Thirteen key exhibits in total were substantively misstated – most diametrically reversed – in the state decision and order of summary judgment. Following are exacting quotes of the "Pollets Report" and "Case Closures" reports from the record compared to clearly counterfeit citations from the state decision:

The Pollets Report, an investigation commissioned on plaintiffs' request by the charter school's Board of Trustees, found school CEO Timothy Anderson *solely* responsible for billing irregularities uncovered in the aforementioned state audit. However, in a citation within the widely published state decision and order of summary judgment, the Pollets Report was misrepresented as having found exclusively *against* Beck. Moreover, the report's unequivocal corroboration of the State Auditor's finding against the CEO (defendant in *Beck I*) was eliminated.

Accounting for over $1 million in "undocumented billings" enumerated by the State Auditor, **the Pollets report** of investigation, commissioned by the school, found that "[school CEO Timothy] *Anderson's enrollment decisions* ... were based on his belief that a student was enrolled when an application was accepted and a space was reserved ... The School later adopted more stringent guidelines and criteria for enrollment ...."

Without acknowledging the principal finding of Anderson's questioned enrollment practices and the school's corrective action, as partly quoted above, **the state superior court substantively misrepresented** in its Decision and Order only that "[a]ccording to the [Pollets] report, *Beck did make a number of errors.*" (Italics supplied.)

Consistent with the polar misstatement of the Pollets Report in its decision and order, an undoubtedly unwitting presiding justice ruled, "[T]here is no evidence of falsity of the statement ... that Beck and Young repeatedly ... made false entries on submissions ... to the DOE." Notably, the court was aware that plaintiff-whistle-blowers Beck, Young, and Higgs had personally instigated both the state audit and Pollets investigations.

In the Pollets Report, authors John Pollets, Esq. and fellow school investigator-trustee Miriam Brownwall exonerated Beck and Young of having made even one enrollment error – let alone "repeated[]" ones – in regard to the State Auditor's million-dollar finding of "undocumented billings" attributed exclusively to CEO Anderson.

Similarly, an **FBI "Case Closures" report**, which found no computer crimes committed against the school, was misquoted in the state court's decision and order as implicating Plaintiff Higgs in unauthorized access to the school's server, a serious computer crime of which CEO Anderson and another defendant had publicly accused both Higgs and Young.

> Concluding a field investigation called by the school, an **FBI "Case Closures" Report** found, "Investigation determined access to system was obtained via default Windows 95 settings allowing file sharing and remote access. *U.S. Attorney's Office declined prosecution. Request case be closed.*"
>
> In its Decision **the Court misquoted**, "[A] copy of ***Higgs' FBI report*** states that the '[i]nvestigation determined *that* access to *the* system was obtained via default Windows 95 settings allowing file sharing ***from a*** remote access [final two sentences of report, as quoted immediately preceding, are omitted in the Court's citation].'" (Italics and bolding are supplied to highlight misquotes and omissions.)

While "file sharing and remote access" are computer-network settings that imply no wrongdoing whatsoever, the misquote "file sharing ***from a*** remote access" connotes an overt, indeed *covert,* act or acts of downloading data from a network to a computer operated remotely – presumably by Plaintiff Higgs as subject of a "Higgs' FBI Report."

The correct title of the Bureau's report is "Case Closures." The misnomer "Higgs' FBI Report" was substituted by the court in its decision and order.

Conspicuously omitted are the two concluding sentences calling for the school investigation to be closed without further action – just as were four unrelated investigations included in the same "Case Closures" Report. The Bureau's dispositive finding confirmed there had been no computer crimes committed and thus no suspects identified or investigated.

To obtain the "Case Closures" report, the plaintiffs, prior to filing *Beck I*, submitted FOIA requests to the Bureau. Some 20 agency documents ultimately were placed in the record of *Beck I*, virtually all showing that the defendants' damaging public accusations against Higgs and Young for "wire tapping" and "data theft" were groundless and arguably malicious.

FBI agent Neil Cronin, who participated in the investigation, later described the school's filing with the Bureau as "frivolous" and "mean-spirited,"

However, misinformed in the draft decision and order of summary judgment that an ongoing FBI investigation had in effect indicted Higgs for computer crimes – just as another citation in the state decision reversed the "Pollets Report" to blame whistle-blower Beck for manifold enrollment errors – the presiding state superior court judge unwittingly, but understandably, ruled that defendants "... cannot be found liable for [stating that] ... the FBI was investigating Young and Higgs ...."

The plaintiffs were prevented from presenting their evidence and witnesses in court not by a summary judgment per se, but rather by surreptitiously planted, false citations to the record that compromised that judgment. A rudimentary *Rooker-Feldman* test asks "... whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996).

Beck II defendants concede that the challenged citations to the record in the *Beck I* summary judgment are misstatements, while insisting that the references had no effect on the decision and order. Nonetheless, defendants argue that plaintiffs' arguments 'inextricably intertwine' *Beck II* with *Beck I*, invoking *Rooker-Feldman*. Hardly. False declarations are *extricable*, having no substantive relevance to underlying issues.

Particularity

The district court observed, **"At the most recent hearing, the plaintiffs made a veiled [statement] ... that** [state superior court justice] **Judge Chin was duped by his own clerks. Without greater particularity, however, the plaintiffs' complaint fails to state a claim for fraud."** (App. B, p. 9)

While the plaintiffs indeed were gratuitously forewarned by a court reporter of a likelihood in *Beck I* of adjudicative fraud in drafting the decision, a practice he lamented was on the rise in superior court, the plaintiffs have not in any process or proceeding before a state or federal court relied upon hearsay of third parties.

In their complaint to the district court, the plaintiffs with only *studied* particularity drew five direct comparisons between citations in the state decision and the exhibits cited, including the aforementioned "Pollets" and FBI reports (pp. 11-15). Each comparison clearly demonstrated ...

- that through misquote or misstatement key exhibits on record in *Beck I* are diametrically misrepresented in the state decision and order of summary judgment;
- that the misrepresented records otherwise demonstrate the materiality of disputed facts, any of which would disallow summary judgment with

regard to one or more of ten counts;

- that the serial misrepresentations all favor defendants in *Beck I* exclusively; and,
- that misrepresentative citations to the record appearing above the signature of the presiding judge show perforce that the decision was compromised.

In its order the district court reports that petitioner-plaintiffs alleged "**many errors**" by a state judge (App. B, p. 9). Rather, the petitioners *particularized* distortions of the record that clearly were planted within a state court process. They did not question the state court's legal *theory as* would trigger *Rooker-Feldman,* but argued factual falsehoods.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *Fed. R. Civ. P. 9(b)* ("Fraud, Mistake, Condition of the Mind")

Plaintiffs understand that ultimate proof of extrinsic fraud in *Beck I* requires discovery and trial – so far denied – prior to which only perpetrators can have full knowledge of motive and opportunity. However, preponderant albeit circumstantial evidence of extrinsic fraud can yet be compelling – *res ipsa loquitur* – before discovery affords additional particulars, such as identities, methods, and purposes.

Notably, in appealing the state superior court decision to the Mass. Appeals Court, the petitioner-plaintiffs attempted to identify the legal clerk(s) who drafted the subject decision and order, but were rebuffed by the Plymouth County Superior Court and presiding associate judge in *Beck I* citing court rules.

"Before discovery has unearthed relevant facts and evidence, ***it may be difficult to define the***

precise formulation of the required prima facie case." Swierkiewicz *v.* Sorema N. A. 534 U.S. 506 (2002). (Emphasis supplied.) In *Beck II* the 'what, where, when, and why' are self-evident; only 'who and how' await discovery and trial.

Consecutive motions to dismiss allowed by the Massachusetts Appeals Court, the U.S. District Court, and First Circuit Court of Appeals, deprived plaintiffs of discovery by which to enhance *particularity*.

Intrinsic Evidence of Extrinsic Fraud

The district court opined, "**[T]he only evidence of fraud is entirely intrinsic to the state court decision.**" (App. B, p. 9)

The terminologies "intrinsic evidence" and "extrinsic fraud" are not antonymous or mutually exclusive, as the district court implies. "Extrinsic fraud is conduct which prevents a party from presenting his claim in court." *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981). "Intrinsic evidence" – opposite of *"extrinsic evidence"* – is that which is found or deduced from within a subject writing, although not necessarily exclusively or "entirely."

The plaintiffs in *Beck II* readily acknowledge their reliance upon *intrinsic evidence* of *extrinsic* fraud – but not *a priori*. The misquotation of the FBI's "Case Closures" report was not determined "entirely intrinsic[ally]," as the district court opines. The actual report – *extrinsic* to the decision and order – provided half the evidence.

Likewise, the petitioner-plaintiffs did not *deduce* exclusively from the state decision that the "Pollets Report" had been misrepresented. The petitioners cited and compared the original document, which stood *apart* in the case record. Notably the plaintiffs had doggedly pursued the "Pollets Report" for

nearly a year through submissions of consecutive FOIA and discovery requests, only to see their prized exhibit reversed in the state court process.

Inasmuch as a total of thirteen citations appearing in a state decision and order of summary judgment materially misrepresented the record – as demonstrated in direct comparisons – the plaintiffs indeed were "prevent[ed] from presenting [their] claim in court." Id. The perpetrators of extrinsic fraud left not one disputed factual assertion by the plaintiffs standing, thereby leaving the presiding judge no option but to allow summary judgment in favor of the movant defendants, count by count.

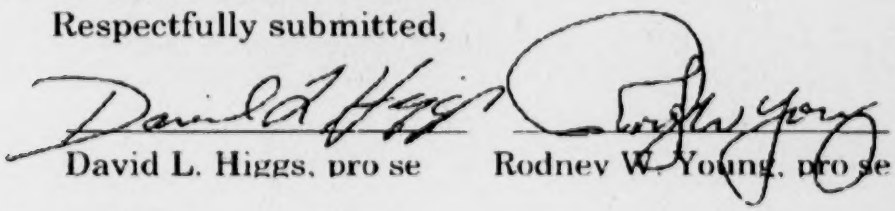
A non-evidentiary summary-judgment hearing conducted three months prior to the presiding judge's signing the decision, was entirely compromised. The several key exhibits that the plaintiffs managed to cite in court were among the thirteen turned around within the state process. The hearing might as well not have been held.

CONCLUSION

Plaintiffs say that adjudicative fraud is intolerable, and when apparent as in *Beck I* – notwithstanding the important principles of separation and immunity guaranteed by the *Rooker-Feldman* doctrine – should not be allowed to deny citizens due process.

There must be general philosophical agreement within the federal judiciary as to when and *when not* to apply *Rooker-Feldman*.

Respectfully submitted,



David L. Higgs, pro se Rodney W. Young, pro se

Date: August 18, 2008

APPENDICES

Judgment of the United States Court of Appeals For the First Circuit:

Civil Action No. 07-2540, April 4, 2008
Higgs v. Plymouth Cty. Sup. Court, et al ..... A

Memorandum and Order of the United States District Court For the District of Massachusetts:

Civil Action No. 06-11721-NMG August 17, 2007
Beck v. Plymouth Cty. Sup. Court, et al ..... B

United States Court of Appeals
For the First Circuit

No. 07 - 2540

DAVID L. HIGGS, ET AL.,

Plaintiffs, Appellants,

DAVID M. BECK,

Plaintiff,

v.

PLYMOUTH COUNTY SUPERIOR COURT, ET AL.,

Defendants, Appellees

Before

Lynch, Lipez and Howard,

Circuit Judges

JUDGMENT

Entered: April 4, 2008

In its Memorandum and Order dated August 17, 2007, the district court explained clearly and comprehensively the basis for its dismissal of appellants' complaint. Substantially for the reasons discussed in the Memorandum -- the jurisdictional bar posed by the Rooker-Feldman doctrine and the immunity of certain appellees from civil liability -- the judgment of dismissal is summarily affirmed. 1st Cir. R. 27.0(c).

By the Court:

/s/ Richard Cushing Donovan, Clerk.

cc:

David M. Beck
Rodney W. Young
David L. Higgs
Mark P. Sutliff
Maiti A. Parsi

Appendix A

United States District Court
District of Massachusetts

DAVID M. BECK,	)	
DAVID L. HIGGS,	)	
and RODNEY W. YOUNG,	)	
Plaintiffs,	)	
	)	**Civil Action No.**
v.	)	**06-11721-NMG**
	)	
PLYMOUTH COUNTY	)	
SUPERIOR COURT et al.,	)	
Defendants.	)	

MEMORANDUM & ORDER

GORTON, J.

A group of plaintiffs, proceeding pro se, have filed suit pursuant to 42 U.S.C. § 1983 against three separate courts of the Commonwealth as well as judges, court officers and prosecutors for alleged violation of their civil rights. The defendants have filed a motion to dismiss which is opposed by the plaintiffs. The motion is resolved as follows.

I. Background

A. Procedural History

On September 25, 2006, Plaintiffs David Beck ("Beck"), David L. Higgs ("Higgs") and Rodney W. Young ("Young") (collectively, "the plaintiffs"), brought this action against Plymouth County Superior Court ("PCSC"), Richard J. Chin ("Chin"), Linda E. Giles ("Giles"), Clerk(s) John Doe(s), John Doe, Massachusetts Appeals

Court ("Appeals Court"), R. Marc Kantrowitz ("Kantrowitz"), Gilbert P. Lima, Jr. ("Lima"), the Supreme Judicial Court of Massachusetts ("the SJC"), Margaret H. Marshall ("Marshall"), Thomas F. Reilly ("Reilly") and Kurt N. Schwartz ("Schwartz") (collectively, "the defendants"). All of the individual defendants, except John Doe(s), are being sued in their official capacities. Defendants Chin, Giles, Lima, Clerk(s) John Doe(s), John Doe and Schwartz are also being sued in their individual capacities.

The defendants filed a motion to dismiss on October 30, 2006, and the plaintiffs filed an opposition to that motion on December 1, 2006. A scheduling conference in this matter was conducted on June 28, 2007, at which time the Court heard brief oral argument on the motion to dismiss. The Court directed the defendants to file a supplemental memorandum in support of their motion to dismiss, which was submitted on July 6, 2007. The plaintiffs then filed a motion for leave to submit a reply brief, which was allowed, and the memorandum was filed on July 24, 2007.

B. Factual Background

This case arises from an unsuccessful lawsuit filed by the plaintiffs in state court. The plaintiffs brought that action in Plymouth Superior Court against several Town of Plymouth school officials whom they alleged conspired to defame the plaintiffs for "blowing the whistle" on fiscal fraud with respect to the

South Shore Charter School. The defendants in that case successfully moved for summary judgment and the plaintiffs lost their subsequent appeals in the Massachusetts Appeals Court and the SJC. The plaintiffs further requested that the Massachusetts Attorney General bring criminal charges against certain Town officials but the state prosecutors declined to do so.

The plaintiffs now bring this action against all of the courts, judges and prosecutors involved in the state proceedings for their failure to rule in the plaintiffs' favor or to prosecute the plaintiffs' criminal complaint. The complaint in this case alleges, in essence, that judges, clerks and prosecutors at every level of the state judicial system conspired to deprive the plaintiffs of their civil rights by ruling against them at every turn.

The defendants, jointly represented by the Office of the Attorney General, have moved to dismiss the claims on the grounds that 1) the Court should abstain from jurisdiction based on the Rooker Feldman doctrine, 2) the judicial defendants are protected by absolute judicial immunity and 3) the prosecutors are protected by quasi-judicial and prosecutorial immunity. The immunity defense will be considered first.

II. Analysis

A. Legal Standard

A court may not dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b) (6) "unless it appears, beyond doubt, that the [p]laintiff can prove no set of facts in support of his claim which would entitle him to relief." Judge v. City of Lowell, 160 F.3d 67, 72 (1st Cir. 1998)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In considering the merits of a motion to dismiss, the court may look only to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the complaint and matters of which judicial notice can be taken. Nollet v. Justices of the Trial Court of Mass., 83 F. Supp. 2d 204. 208 (D. Mass. 2000) aff'd, 248 F.3d 1127 (1st Cir. 2000). Furthermore, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. Langadinos v. American Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied. See Nollett, 83 F. Supp. 2d at 208.

B. Judicial Immunity

Absolute immunity from civil liability applies to any judicial officer for any normal and routine judicial act. Stump v. Starkman, 435 U.S. 349 (1978). Judges of courts of general

jurisdiction are, therefore, not liable in a civil action for damages arising from their judicial actions. Id. This immunity applies no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding or how malicious the motive. Cleavinger v. Saxner, 474 U.S. 193 (1985). The only exception occurs where a court acts "in the clear absence of all jurisdiction." Malachowski v. City of Keene, 787 F.2d 704, 710 (1st Cir. 1986). There are no allegations in this case that the judges or clerks in question were acting outside their jurisdictional authority. Rather, all of the alleged acts occurred within the jurisdiction of the respective courts of the judicial defendants. The complaint, therefore, will be dismissed with respect to all of the judges, clerks and courts named in the complaint.

C. Quasi-Judicial Immunity

The principles of judicial immunity discussed above also extend to prosecutors. Prosecutors are immune from litigation for those activities closely related to the judicial phase of criminal proceedings for actions that are within the scope of their prosecutorial duties. Imbler v. Pachtman. 424 U.S. 409, 420 (1976). The decision whether or not to initiate a prosecution is such an activity. See id. at 430.

The allegation against the prosecutors in this case is that they declined to initiate an investigation or prosecution at the

request of the plaintiffs. That decision is within the discretion of the prosecutors and falls within the scope of protected activity. The case against the prosecutors will, therefore, be dismissed.

D. Rooker-Feldman Abstention

Under the so-called Rooker-Feldman doctrine, federal district courts may not entertain suits brought by unsuccessful litigants in state-court actions to correct alleged legal errors committed therein. See. Exxon Mobile Corp. v. Saudi Basic Industries Corp, 544 U.S. 280, 284 (2005) (citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 O.S. 462 (1986)). The doctrine bars a losing party in state court from seeking what would be,in essence, appellate review of the state judgment in a United States District Court based on the losing party's claim that the state judgment itself violates the loser's federal rights. Johnson v. DeGrandy, 512 U.S. 997, 1005-06 (1994). Moreover, pursuant to 28 U.S.C. § 1257, the Supreme Court of the United States has exclusive jurisdiction over appeals from final state- court judgments.

This case falls within the Rooker-Feldman doctrine because the plaintiffs seek relief from a state court judgment for alleged legal error committed by the state court. The essence of the plaintiffs' claim is that Judge Chin, in his summary judgment

opinion, materially misstated or omitted key portions of the factual record. While the plaintiffs insist that their case is based on extrinsic fraud, they offer no evidence of such fraud apart from Judge Chin's opinion itself.

The appellate courts of the Commonwealth conduct de novo review of a grant of summary judgment by the trial court and may review the factual record independently, unlike an appeal from a trial in which the determination of factual disputes is left to a jury. See Matthews v. Ocean Spray Cranberries. Inc.. 426 Mass. 122, 123 n.l (1997); Ritter v. Mass. Cas. Ins. Co.. 439 Mass. 214, 215 (2003). The relief sought by the plaintiffs in the instant action could have been, and was, pursued in the appellate courts of the Commonwealth. No principle prevents state appellate courts from reviewing the factual record de novo and correcting any material errors committed by Judge Chin, regardless of whether such alleged errors were the product of a fraudulent scheme or simple carelessness on the part of the judge or his staff.

In opposition to the motion to dismiss, the plaintiffs rely heavily on a case from the Ninth Circuit, Kougasian v. TMSL. Inc., 359 F.3d 1136 (9th Cir. 2004), in which the Circuit Court of Appeals held that the losing party in a state civil action could bring a subsequent action in federal court against an adverse party when the state judgment had been obtained by

extrinsic fraud. The defendant in that case, TMSL, Inc. ("TMSL"), had also been the defendant in the state court proceeding. The Ninth Circuit held that the plaintiff could pursue an action for fraud against TMSL based on evidence that TMSL had fraudulently induced the state court to rule in its favor. See id. at 1411-12.

The distinction between Kougasian (which is, of course, not binding on this Court in any event) and this case is that the plaintiff in Kougasian did not attempt to sue the state courts to correct alleged errors committed by those courts. Rather, the plaintiff sued the original defendant for fraudulently influencing a state court judgment. Under the logic of Kougasian, if the plaintiffs in this case had evidence that the Town of Plymouth school officials, who were the defendants in the state proceeding, had fraudulently induced the state courts to rule in their favor, they could bring an action for fraud against those defendants. Kougasian. however, does not stand for the proposition that a party which loses in state court can sue the judge to obtain appellate review in federal court, even if the state court judgment had been procured by fraudulent means.

Furthermore, even supposing that the plaintiffs were permitted to sue the state court officials named as defendants in this lawsuit, they have not alleged facts necessary to sustain an action for fraud. Pursuant to Fed. R. Civ. P. 9(b), fraud must

be pled with particularity. While in the view of the plaintiffs the signs of third-party intrusion in the judicial process are "crystal clear", those signs are opaque to this Court.

Despite the plaintiffs' insistence that their action is founded on extrinsic fraud, the only factual allegation offered to support such a theory is that Judge Chin's decision contained so many errors that it must have been the result of fraud. In other words, the only evidence of fraud is entirely intrinsic to the state court decision. At the most recent hearing, the plaintiffs made a veiled reference to an unnamed informant operating within the state court system who has purportedly informed them that Judge Chin was duped by his own clerks. Without greater particularity, however, the plaintiffs' complaint fails to state a claim for fraud. See Mooney v. Boli, 2007 WL 781973, *4 (N.D.Cal. March 13, 2007) (dismissing claim as barred by Rooker-Feldman doctrine where plaintiff failed to allege extrinsic fraud with sufficient particularity).

E. Motion to Stay

The defendants in this case have also filed a motion to stay discovery pending resolution of their motion to dismiss (Docket No. 28). Because the Court will allow the motion to dismiss, the motion to stay will be denied as moot.

ORDER

In accordance with the foregoing, the defendants' motion to dismiss (Docket No. 9) is **ALLOWED** and the action is **DISMISSED**. The defendants' motion to stay (Docket No. 28) is **DENIED as moot**.

So ordered.

[signature]

Nathaniel M. Gorton
United States District Judge

Dated August 17, 2007